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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a search warrant is needed to peer into the open side of a barn that is located in an open field.

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RONALD DALE DUNN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App., *infra*, 1a-11a) is reported at 766 F.2d 880. The original opinion of the court of appeals (App., *infra*, 16a-35a) is reported at 674 F.2d 1093.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 36a) was entered on July 16, 1985. A petition for rehearing was denied on September 11, 1985 (App., *infra*, 14a-15a). On November 2, 1985, Justice White

extended the time for filing a petition for a writ of certiorari to and including December 10, 1985.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, respondent Dunn and his co-defendant, Robert Carpenter, were convicted on one count of conspiracy to manufacture phenylacetone and amphetamine, in violation of 21 U.S.C. 846 (Count One). Respondent also was convicted of manufacturing the two controlled substances (Counts Two and Three), and of possessing amphetamine with intent to distribute (Count Four), all in violation of 21 U.S.C. 841(a)(1) (App., *infra*, 16a-17a). Respondent was sentenced to consecutive terms of four years' imprisonment on each of the four counts, and three years' special parole on Counts Two through Four. He also was fined $10,000 on each count (10 R. 17-18). The court of appeals affirmed Carpenter's convictions but reversed those of

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[1] On October 3, 1985, the court of appeals entered an order recalling the mandate, thereby suspending its order of September 11 denying rehearing. On November 14, 1985, the court of appeals entered a new order denying the petition for rehearing en banc and reinstating its earlier order denying panel rehearing (App., *infra*, 12a-13a). Because the rehearing petition remained pending in the court of appeals (as the court of appeals noted in another case involving respondent, see *United States* v. *Dunn*, No. 84-1012 (Oct. 25, 1985)) and was not finally disposed of until November 14, the government's time to petition for certiorari appears to have begun to run anew on that date and does not expire until January 13, 1986. In order to eliminate any possible question of timeliness, however, this petition is being filed within the time limits dating from the original September 11 order.

respondent (App., *infra*, 16a-35a). On May 21, 1984, this Court granted the government's petition for a writ of certiorari (No. 82-508), vacated the judgment reversing respondent's convictions, and remanded for reconsideration in light of *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984). On remand, the court of appeals once again reversed respondent's convictions (App., *infra*, 1a-11a).

1. The evidence is detailed in the opinions of the court of appeals. In the summer of 1980, agents of the Drug Enforcement Administration (DEA) were conducting surveillance of Carpenter, who was accumulating large quantities of chemicals and equipment used in the manufacture of amphetamine and phenylacetone, substances controlled by federal law. The equipment included several hot plate stirrers, electric heating devices that apply heat to a container and magnetically stir the contents. Stirrers are used in the "cooking" of chemicals. App., *infra*, 17a-18a.

On September 3, 1980, DEA Agent Robert Surovec obtained a warrant from a Texas state judge authorizing the installation and operation of an electronic beeper in a stirrer. The beeper was installed and activated and, after Carpenter picked it up, the stirrer was tracked to his residence in Spring, Texas. The signal from this beeper was lost several days later. Meanwhile, warrants were obtained for the installation of beepers in a 55 gallon plastic drum of acetic anhydride and in a container of 100 pounds of phenylacetic acid, both ordered by Carpenter. Both beepers were installed, and the chemicals were delivered to Carpenter. The two beepers were monitored from October 27, 1980, until November 5, 1980, when, tracking the beeper in the 100 pound container, agents followed a pickup truck driven by Carpenter

from Houston to respondent's ranch near Johnson City, Texas. At that time, the signal from the hot plate stirrer beeper was detected again, also coming from the Dunn ranch. App., *infra*, 18a-19a.

DEA agents took aerial photographs of the ranch that afternoon. The photographs showed a ranch house at the end of a private driveway about one-half mile from a public road, a smaller house adjacent to the main residence, a windmill, a water tank, and two barns approximately 50 yards behind the house. The pickup truck was backed up to one of the barns. The entire ranch, about 198 acres in area, was encircled by a barbed wire perimeter fence, and there were several other "typical ranch type" (4 R. 90) interior fences, including one around the residence. The entrance to the private driveway was barred by a locked chain. App., *infra*, 3a, 19a; Exhs. 1-2.[2]

At about 9:00 p.m. on November 5, 1980, DEA Agent Ronald Gospodarek and Officer Martin Fite of the Houston Police Department entered the Dunn ranch by crossing the perimeter fence. They tried to make their way toward the barns behind the ranch house, but became disoriented in the dark. Eventually, they came to the driveway leading to the residence and from there they approached a fence at the rear of the ranch house. There Agent Gospodarek smelled a strong odor of phenylacetic acid, a precursor of phenylacetone. The officers crossed another fence and looked into an open pole barn, where they saw only empty boxes. Continuing to follow the odor they approached a second barn, where they heard the

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[2] "R." refers to the record in the court of appeals. "Exh." refers to the exhibits introduced by the government at the suppression hearing.

sound of a motor running. One end of the barn was open, but the entrance was blocked by a wooden, waist-high gate, which was closed and locked. Some type of netting hung from a tin overhang down to the gate. Standing outside the gate and shining their flashlights into the open side of the barn, the officers saw chemical equipment that appeared to be a phenylacetone laboratory (App., *infra*, 3a-4a, 19a-20a; 4 R. 73-82, 89, 93-94, 107-108; Exhs. 5-6).

Gospodarek and Fite then left the ranch, without crossing the fence around the ranch house, and reported their findings. An affidavit for a warrant to search the ranch was prepared, which included the information obtained from this entry onto the ranch, and the warrant was issued on the evening of November 6, 1980. The warrant was executed on the morning of November 8, at which time respondent was arrested, and the chemicals and equipment were seized. App., *infra*, 4a-5a, 22a; 4 R. 82-83.

2. The court of appeals reversed respondent's convictions, finding that the evidence seized pursuant to the search warrant should have been suppressed because the warrant was based on information obtained during an unlawful warrantless entry onto respondent's land (App., *infra*, 16a-35a).[3] The court rejected the contention that the search was lawful under the "open fields" doctrine; because both the ranch and the barn were surrounded by fences, the court held that the barn was "within the curtilage of the residence" (*id.* at 23a-29a). The court assumed that the government had probable cause to search the ranch,

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[3] Because Carpenter had no legitimate expectation of privacy in the ranch, his convictions were affirmed (App., *infra*, 23a, 35a).

but it held that a warrant was required for the entry and search (*id.* at 29a-33a).

3. This Court vacated the decision of the court of appeals and remanded for reconsideration in light of *Oliver* v. *United States*, No. 82-15 (April 17, 1984). No. 82-508 (May 21, 1984). On remand, the court of appeals determined that, in light of *Oliver*, it could no longer be maintained that the agents had entered onto the curtilage in crossing the outer fences of the ranch (App., *infra*, 5a-8a). It concluded that the barn "was not within the protected curtilage of the Dunn ranch house" (*id.* at 7a-8a). The court went on to state, however, that the barn was not an open field and "ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy" (*id.* at 10a). The court found that respondent had taken steps to protect his privacy, noting the fences, the fact that one could see into the barn only from close range, and the fact that the barn was not open to entry (*ibid.*). Accordingly, the court concluded that respondent had a reasonable expectation of privacy in his barn and its contents, and therefore the officers' visual "search" of the barn from their exterior vantage point required a warrant (*ibid.*). The court again ordered that the evidence seized from respondent's barn be suppressed and his convictions reversed.

REASONS FOR GRANTING THE PETITION

In attempting to resurrect its original holding in this case after the basis for that holding was eliminated by this Court in *Oliver*, the court of appeals has reached a completely untenable result. The court has found that the police officers here infringed no constitutional rights in entering respondent's prop-

erty and approaching his barn as they followed the scent of the phenylacetic acid across the open fields. But when they have tracked that odor to its source and found it to be a barn exposed to view on one side, and although they have probable cause to believe that they would see an illegal narcotics laboratory if they just open their eyes, they must, according to the court of appeals, avert their eyes and depart to apply for a search warrant in order to look into the barn. The justification for this absurd result is an alleged expectation of privacy in the contents of the barn that rests on three shaky props: 1) the existence of a typical ranch fence surrounding the barn—which has already been held by this Court not to confer a legitimate expectation of privacy; 2) the fact that a gate bars entry to the barn—which is quite irrelevant since it has never been suggested that the officers entered or sought to enter the barn without a warrant; and 3) the fact that the contents of the barn would not have been visible to the officers had they been standing somewhere else—which can be said of almost anything situated in an open field and is also quite irrelevant. By its decision, the court of appeals has injected uncertainty into fundamental principles of Fourth Amendment law heretofore seemingly well settled. In addition (assuming no revision of general principles was intended), the court's circumvention on such a flimsy basis of this Court's decision vacating its earlier judgment should not be permitted to stand. See *Florida* v. *Rodriguez*, No. 83-1367 (Nov. 13, 1984).

To the extent the decision below rests on a legal principle not erased by *Oliver*, it seems to stand for the proposition that an area protected by the Fourth Amendment from warrantless entry is also protected

from warrantless visual inspection even if no entry is made. This proposition is completely inconsistent with the well-settled principle that a government official is not "precluded from observing as an officer what would be entirely visible to him as a private citizen." *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (plurality opinion). See also *Maryland* v. *Macon*, No. 84-778 (June 17, 1985), slip op. 5; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 315 (1978); *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974). Under *Oliver*, it is clear that the police were entitled to approach the barn just as a member of the public might reasonably have been expected to do. The court of appeals acknowledged this. Respondent had no reasonable expectation that a member of the public would not thereupon look into the open side of the barn, and the Fourth Amendment does not prevent a police officer from doing the same thing.

It is well established that the fact that the Fourth Amendment protects an area against warrantless *entry* does not mean that the Constitution erects a barrier to visual observation of that area from places open to the public. See, *e.g.*, *Oliver*, slip op. 7 n.9 (litigation focused on lawfulness of entry; no question that observation from outside the property was lawful); *Texas* v. *Brown*, *supra* (looking into an automobile); *United States* v. *Santana*, 427 U.S. 38 (1976) (observing individual in doorway of her home); *United States* v. *Lee*, 274 U.S. 559 (1927) (looking onto a boat deck).[4] Here, respondent could

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[4] Two cases pending before this Court, *Dow Chemical Co.* v. *United States*, No. 84-1259 (argued Dec. 10, 1985), and *California* v. *Ciraolo*, No. 84-1513 (argued Dec. 10, 1985), raise the question whether this principle extends to observa-

not claim a reasonable expectation of privacy in the interior of his barn, for he had quite clearly exposed it to public view by leaving one part of a side open and covering it with a non-opaque netting. The officers, by looking into the open barn from outside, did no more than observe what was already exposed to their view.[5]

The court of appeals acknowledged that the barn was not on the curtilage, but its decision seems to rest on the theory that the interior of the barn was imbued with an expectation of privacy akin to that of the curtilage. Even were that so, however, such an expectation of privacy is one of being free from entry, not observation. A long line of cases plainly demonstrates that the Court has always assumed that mere observation of the curtilage is lawful. In *Hester* v. *United States*, 265 U.S. 57 (1924), for exam-

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tion or photography from the air. An affirmance in *Dow Chemical* and reversal in *Ciraolo*, which we believe to be the appropriate results, would further confirm the untenability of the decision below. For this reason, the Court may wish to consider holding this case for *Dow Chemical* and *Ciraolo*. We emphasize, however, that the decision in this case is clearly wrong regardless of the ultimate disposition of *Dow Chemical* and *Ciraolo*. Whatever the rule for aerial observation, it cannot seriously be suggested that a police officer standing on his own two feet in a place to which the public has access requires a warrant in order to observe what is exposed to naked eye viewing.

[5] While the Court need not reach the question to decide the case, we note our position that a warrant is not required to make even an entry into a relatively non-private structure of the kind involved in this case. Even if the partially open barn is not deemed part of the open field, it supports only a limited expectation of privacy such that officers with probable cause do not act unreasonably in entering and searching such a structure.

ple, the police officers who entered the open field were able to observe the defendant in possession of contraband just outside the doorstep of his house. 265 U.S. at 58. Once the Court determined that the trespass did not violate the Fourth Amendment, it did not doubt that the officers lawfully could observe the defendant's activities from their vantage point in the open field, although those activities almost surely took place within the curtilage. Similarly, in *United States* v. *Karo*, No. 83-850 (July 3, 1984), and *United States* v. *Knotts*, 460 U.S. 276 (1983), the Court considered the Fourth Amendment implications of police monitoring of a "beeper" transmitting signals from in or near a privately owned building. The Court found manifestly unobjectionable the use of a beeper to obtain information available from visual surveillance, even if that surveillance extended up to the door of a residence (see *Karo*, slip op. 7-9; *Knotts*, 460 U.S. at 281-282, 285). The only Fourth Amendment problem arose from the use of the beeper "to obtain information that it could not have obtained by observation from outside the curtilage of the house" (*Karo*, slip op. 9). In sum, the fact that government officials may lack authority in a given situation to enter the curtilage of a residence does not prevent them from standing outside the curtilage and looking inside to observe what is exposed to their view from that vantage point. See also *Fullbright* v. *United States*, 392 F.2d 432, 434-435 (10th Cir.), cert. denied, 393 U.S. 830 (1968). By the same token, the officers in this case standing in respondent's open field were not constitutionally barred from looking inside a partially enclosed structure that was open to their view.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary disposition.

Respectfully submitted.

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DECEMBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RONALD DALE DUNN, DEFENDANT-APPELLANT

July 16, 1985

Appeal from the United States District Court
for the Western District of Texas

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before WISDOM, POLITZ and TATE, Circuit Judges.

POLITZ, Circuit Judge:

Granting the government's petition for writ of certiorari, *United States v. Ronald Dale Dunn*, 466 U.S. ——, 104 S.Ct. 2380, 81 L.Ed.2d 340 (1984), the

Supreme Court vacated our disposition of Dunn's appeal, *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982), and remanded "for further consideration in light of *Oliver v. United States*, 466 U.S. [——] [104 S.Ct. 1735, 80 L.Ed.2d 214] (1984)." Consistent therewith we have reconsidered our decision in light of the teachings of *Oliver* on the question of open fields and curtilage in fourth amendment analytical methodology. Upon reconsideration, we conclude that the barn in which Drug Enforcement Agent Ronald Gospodarek found the phenylacetone laboratory was not within the constitutionally protected curtilage of the ranch house. We have further concluded, however, that the agent's actions in crossing two fences alongside and around the barn, going under the front overhang of the barn to a position immediately adjacent to an inset wall and, with aid of a flashlight, peering through the barn's front fishnet covering to view its contents on November 5, 1980, violated the fourth amendment and tainted the subsequent seizures and inculpatory statements. Accordingly, we reverse the convictions of Dunn and remand for further proceedings. In doing so we reinstate a portion of the panel opinion as detailed herein.

Background Facts [1]

In the summer of 1980, Robert Lyle Carpenter, charged and convicted as a co-defendant with Dunn, began accumulating large quantities of chemicals and equipment typically used for the manufacture, *inter alia*, of phenylacetone, a controlled substance. DEA agents who had Carpenter under surveillance obtained

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[1] For additional factual data we refer to our earlier opinion, 674 F.2d 1093.

warrants for the installation of electronic beepers in purchases made by Carpenter, specifically an electric hot plate stirrer, a drum of acetic anhydride, and a container of phenylacetic acid. Guided by the beepers, DEA agents trailed Carpenter from Houston to Dunn's ranch near Johnson City, Texas during the morning of November 5, 1980. That afternoon, agent Gospodarek examined the ranch by air and took several aerial photographs.

The Dunn ranch contained 198 acres and was circled by a perimeter fence. The ranch house, outbuildings and improvements were one-half mile from a public road, connected by a private driveway blocked by a locked chain. The residence and other buildings were clustered in a small clearing not visible from either the public road or the perimeter fence. In addition to the exterior fence, there were several interior fences, most composed of multiple strands of barb wire.

The ranch house enclave contained the ranch house, a large garage/carport, a small greenhouse, two barns, a windmill and a stone water tank. There were several fences, including one around the ranch house and greenhouse, another around a side yard, one running from the ranch house to the large barn, and one traversing the front of the large barn. The large barn was approximately 50 yards behind the fence encircling the ranch house and the small barn was about thirty yards to its side separated by the windmill and the water tank.

The back and sides of the large barn were composed of brick, metal siding, and large metal sliding doors and were completely enclosed. The front of the barn was partially composed of a wooden wall with windows. The remainder was enclosed by waist-high wood slatting and wooden gates. At the time

of agent Gospodarek's visits on the night of November 5 and again the next day, the top half of the front of the barn was covered by a fishnet type material from the ceiling down to the top of the locked wooden gates. To see inside the barn it was necessary to stand immediately next to the netting. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting.

Around 9:00 p.m. on November 5, 1980, Gospodarek and officer Martin Fite of the Houston Police Department made surreptitious entry into the Dunn ranch. They crossed the perimeter fence and one other before reaching the clearing midway between the ranch house and barns. At that point Gospodarek smelled what he believed to be stored phenylacetic acid in solid state. The officers crossed one barb wire fence and looked into the smaller barn but saw only empty boxes. They crossed another barb wire fence, reached the closed side of the larger barn, walked around the back and sides but could not see inside. They retraced their steps and scaled a wooden fence at the front of the barn, entered under the overhang of the barn and walked to the locked front wooden gates topped by the netting material. After checking the house and determining that a flashlight could be used without the likelihood of discovery, Gospodarek shined his light through the openings in the netting, peered through and saw chemicals and equipment positioned in what appeared to be a manner typical of a crude phenylacetone laboratory. Gospodarek described the setting of the lab as being in a "closed-in area with walls on all sides except for the front where the waist-high gate and the fishnet was."

Principally based on agent Gospodarek's observations on the night of November 5, the DEA obtained a search warrant on November 6. The warrant was

executed on the morning of November 8 at which time Dunn was arrested and the chemicals, equipment, and a quantity of amphetamines were seized. In response to questions after his arrest Dunn admitted his culpability and directed the officers to a closet containing bags of the finished illicit product.

In our earlier opinion we concluded that the place from which agent Gospodarek viewed the contents of the barn was within the curtilage of the ranch house and thus was protected by the fourth amendment. Since the search was without a warrant we found it illegal, tainting the physical evidence found in the barn and house as well as the inculpatory statements made by Dunn after his arrest. We directed the suppression of all such evidence. It is this holding we have re-examined in light of the *Oliver* decision.

Analysis

In *Oliver* the Supreme Court reaffirmed its benchmark holding authored by Justice Holmes in *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), declaring that the fourth amendment extends to the home and its curtilage but does not extend to open fields. The Court defined curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" 466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d at 225. In a footnote Justice Powell, writing for the majority added that "for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience." 466 U.S. at ——, 104 S.Ct. at 1743, 80 L.Ed.2d at 226 n. 12. Having given this direction, the Court declined to speak with specificity

about the extent or precise parameters of the curtilage and found it unnecessary "to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself." 466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d at 225 n. 11. Referring with apparent approval to a decision by this circuit (*United States v. Williams*, 581 F.2d 451 (5th Cir.1978)), and those of two of our sister circuits, the Court concluded its guidance on the definitional process by noting that the courts of appeals considering the issue "have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." 466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d at 225.

The lessons of *Oliver* are clear as applied to a part of the instant inquiry. It is apparent that agent Gospodarek and officer Fite did not violate the fourth amendment by crossing the perimeter fence and any cross fences as they approached the ranch house enclave. It is also apparent that their continued progress toward the large barn was not proscribed by the Constitution so long as they remained in open fields, outside the curtilage. The effect of their circling the large barn, being unable to see inside through the back or sides, climbing a wooden fence at its front, entering its overhang and going into the immediate proximity of the fishnet and wooden gate front enclosure, is not so informed by *Oliver's* lead and nudge.

In this circuit's prior jurisprudence, essentially collected in *United States v. Williams* cited by the Supreme Court, as well as in decisions by our colleagues in other circuits, three factors seem to surface in the curtilage-quest: (1) the distance between

the place in question and the house; (2) whether the place is within a general enclosure that includes the house; and (3) the purpose or use of the questioned place. *See Care v. United States*, 231 F.2d 22 (10th Cir.1956).

The barn in the case *sub judice* was located approximately 50 yards beyond the fence which encircled the ranch house. In *Walker v. United States*, 225 F.2d 447 (5th Cir.1955), we held that the curtilage there included a barn 70 to 80 yards distant from the principal dwelling. Although relevant, distance alone is not dispositive of the question.

The second factor, commonality of enclosure, militates against Dunn's contention that the barn was in the curtilage. The ranch house and large barn were not within a common enclosure, they were separately enclosed. A substantial fence surrounded the ranch house, garage/carport and greenhouse, making those buildings an apparent unit. A lesser fence enclosed the front of the large barn, connecting to its sides. The open area between the ranch house and barn was partially fenced.

The third factor, purpose or use, weighs on the curtilage tray. A barn is a typical part of a farm or ranch and has been referred to as "a domestic building constituting an integral part of that group of structures making up the farm home." *Walker v. United States*, 225 F.2d at 449. *See also United States v. Williams; United States v. Tabor*, 722 F.2d 596 (10th Cir. 1983).

Weighing these factors under the illumination of *Oliver*, giving particular weight to the presence of the two separate fences plus a fenced-in open space between the large barn and the ranch house, we are persuaded, albeit not without substantial reservation, that the large barn was not within the protected

curtilage of the Dunn ranch house. This conclusion does not end our inquiry, however, because the fourth amendment applies to places other than just houses and their curtilages.

The holding of *Oliver* relates only to open fields. The Court declares "from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." 466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d 225-26. We must decide whether agent Gospodarek and officer Fite went beyond the permissible open fields and intruded into a constitutionally protected area when they approached and peered into the large barn.

In discussing the reach of open fields the *Oliver* Court observed:

> It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. As open field need be neither "open" nor a "field" as those terms are used in common speech. For example, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment.

466 U.S. at ——, 104 S.Ct. at 1742, 80 L.Ed.2d at 225 n. 11. The term has been applied to land which is fenced or posted and to vacant lots in urban areas, open beaches, reservoirs, and open waters. *See* LaFave, *Search & Seizure* (1978) § 2.4 nn. 5-13. We have found no case, however, applying the term to a building of any consequence.

Fourth amendment protection has been extended to commercial buildings, warehouses, containers, modes

of transportation, even telephone booths, in short, nearly any structure or item in which a person has a reasonable expectation of privacy. *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (stone quarry); *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1979) (furniture store); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (electrical and plumbing installation facilities); *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (warehouses); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed. 2d 530 (1977) (leasing offices); *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968) (union offices); *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889; 11 L.Ed.2d 856 (1964) (hotel rooms); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (telephone booth); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (footlocker); *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) (luggage); *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777 (1974) (vehicle); *United States v. Ehrlichman*, 546 F.2d 910 (D.C.Cir.1976) (psychiatrist office); *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir.1971) (college dormitory room); *United States v. Duckett*, 583 F.2d 1309 (5th Cir.1978) (mail); *United States v. Nasser*, 476 F.2d 1111 (7th Cir.1973) (government office); *United States v. Speights*, 557 F.2d 362 (3rd Cir.1977) (lockers); *United States v. Trickey*, 711 F.2d 56 (6th Cir.1983) (outbuilding of printing business); *United States v. Emens*, 649 F.2d 653 (9th Cir.1980) (boats). A barn is as much a part of a rancher's place of business as a warehouse or outbuilding is part of an urban merchant's place of busi-

ness. It is and ought to be constitutionally protected from warrantless searches if the owner or occupier takes reasonable steps to effect privacy. For as the Court noted in *Katz v. United States*, 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582 "the Fourth Amendment protects people not places."

Dunn took a number of steps to preserve privacy. Some result from the layout of his ranch and others from his affirmative acts. These steps, with different applications and different weights, all factor into the final conclusion. The barn was located in a clearing surrounded by woods on a 198 acre tract. The ranch was circled by a perimeter fence. The ranch house and buildings were at the end of a private drive approximately one-half mile from a public road. The entrance to the private driveway was secured by a locked chain. The barn was not visible from the public road or perimeter fence. The contents of the barn could not be seen from aerial observation, nor were the contents visible from the ground unless one approached the barn, penetrated its encircling fence, walked under its overhang and stood next to its fish-net front covering. Even then, entry could be made only by force or the hurdling of wooden gates which were locked.

Considering the location, type and placement of the structure, and the other steps Dunn took to limit access to the barn, we find that Dunn had a reasonable expectation of privacy in his barn and its contents. Accordingly, the fourth amendment abrogates the warrantless intrusion by agent Gospodarek and officer Fite on the night of November 5, 1980. That search required a search warrant.

In our original opinion vacated by the Supreme Court we reached the conclusion that the viewing of the barn and its contents by Gospodarek and Fite

was violative of the fourth amendment because the barn was within the protected ambit of the curtilage. We have again reached the conclusion that the barn was subject to constitutional protection, separate and apart from any consideration of the curtilage conundrum. We must now address the remaining issues raised by this appeal which were resolved in the original opinion.

Convinced beyond peradventure that *Oliver* has no impact on those parts of our opinion subtitled "Probable Cause and Exigent Circumstances" and "Dunn's Statements," 674 F.2d 1100-03, we reinstate those paragraphs, the same as if set forth here in extenso and verbatim. We repeat only the final paragraph.

The convictions of Ronald Dale Dunn are REVERSED and the matter is REMANDED for further proceedings not inconsistent herewith.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Texas

[Filed Nov. 14, 1985]

ON SUGGESTION FOR REHEARING EN BANC
Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

A member of this court having requested a poll on the suggestion for rehearing en banc, the order dated September 11, 1985 denying rehearing and rehearing en banc was suspended. The poll was taken and a majority of the judges in active service having voted against a rehearing en banc, the petition for rehear-

ing with suggestion for rehearing en banc is DENIED; further, the order denying the petition for panel rehearing is reinstated and said petition is herewith DENIED.

ENTERED FOR THE COURT

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN and
ROBERT LYLE CARPENTER, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 7/16/85, 5 Cir., 198—, —— F.2d ——)

(September 11, 1985)

Before WISDOM, POLITZ, and TATE, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be

polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-1200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RONALD DALE DUNN and
ROBERT LYLE CARPENTER, DEFENDANTS-APPELLANTS

May 7, 1982

Rehearing Denied June 28, 1982

Appeals from the United States District Court
for the Western District of Texas

Before WISDOM, POLITZ and TATE, Circuit Judges.

POLITZ, Circuit Judge:

Ronald Dale Dunn and Robert Lyle Carpenter were found guilty by a jury of conspiring to manufacture phenylacetone and amphetamine, and to possess amphetamine with intent to distribute, in violation of 21 U.S.C. § 846. Dunn also was convicted for manufacturing the two controlled substances and for possessing amphetamine with intent to distribute. 21

U.S.C. § 841(a)(1). The jury convicted Carpenter of aiding and abetting Dunn in the unlawful manufacturing and possessing. 18 U.S.C. § 2.

Carpenter challenges the sufficiency of the evidence supporting his convictions, particularly that which ties him to Dunn's activities. We are not persuaded; Carpenter's convictions are affirmed. Dunn appeals the trial court's refusal to suppress physical evidence, obtained as a result of warrantless searches of his ranch near Johnson City, Texas, and certain statements he made after arrest. Finding merit in this assignment of error, we reverse and remand.

Background Facts

A careful marshalling of the facts usually is required for appellate review for few, if any, legal questions may be resolved in a factual vacuum. Detailing of facts is particularly critical in cases in which the controlling precedent is less than precise and the perceived distinguishing features are less than overwhelming. The case before us belongs in that category, for in its resolution we are propelled into the amorphous realm of constitutional discussion subtitled "reasonable expectations of privacy." Our task in this context is to separate that which falls within the aegis of this fourth amendment buckler from that which does not. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, 587 (1967) (Harlan, J., concurring).

The factual scenario began in the summer of 1980 with the surveillance of Carpenter, in and around the Houston, Texas area, by agents of the Drug Enforcement Administration (DEA). Carpenter was accumulating large quantities of chemicals and equipment used in the manufacture of controlled sub-

stances, particularly amphetamine and phenylacetone. Some of the purchases were made in his name, some were made in the name of Omega, Inc., a corporation of which he was president, and some were made under the alias "Jack Carter." The equipment acquired included several hot plate stirrers.

A hot plate stirrer is an electric heating device that applies heat to a container and, by use of a built-in magnet, stirs the contents. Stirrers are used in the "cooking" of chemicals.

When Carpenter placed his order for stirrers, DEA Agent Robert Surovec secured a warrant from a Texas state judge authorizing the installation and operation of an electronic beeper in a stirrer. The beeper was installed and activated. Thereafter, on September 3, 1980, Carpenter took possession of the rigged stirrer and was tracked to his residence in Spring, Texas. A few days later the signal from this beeper was lost, to be re-discovered in early November 1980, on Dunn's ranch in Blanco County, Texas.

In the meantime, DEA Agent Ronald Gospodarek secured the installation of a beeper in a 55 gallon plastic drum which was to be used to deliver acetic anhydride ordered by Carpenter. Simultaneously, plans were completed to install a beeper in a container filled with 100 pounds of phenylacetic acid, a precursor to phenylacetone, which Carpenter had ordered. Warrant authorization was granted by state authorities. Thereafter, the drum and container, laden with the chemicals and beepers, were delivered to Carpenter.

The drum and container beepers were monitored from October 27, 1980 until November 5, 1980. On the latter date, Gospodarek and other officers, homing on the container beeper, trailed Carpenter, driving a pickup truck, from Houston to Ronald and

Betty Dunn's ranch near Johnson City, Texas. Aerial surveillance disclosed the truck backed up to a barn behind the ranch residence, apparently for the unloading of its contents. It was at this time that the hot plate stirrer beeper, lost in early September, was detected. It, too, was on the ranch property.

On the afternoon of November 5, 1980, DEA agents took aerial photographs of the ranch. The photographs showed a ranch house set back approximately ½ mile from a public road, at the end of a private driveway, a smaller house immediately next to the main residence, a windmill, a water tank, and two barns approximately 50 yards behind the house. The residence enclave was surrounded by trees and the ranch acreage was circled by a perimeter fence. There were several interior fences near the buildings and at other locations. The private driveway was secured by a locked chain.

Around 9:00 p.m. on the night of November 5, 1980, after studying the photographs, Gospodarek and Officer Martin Fite of the Houston Police Department crossed the perimeter fence and approached the confines containing the buildings. They became disoriented in the dark but eventually came to the driveway leading to the residence. They went to a fence at the rear of the ranch house and there detected a strong odor of phenylacetic acid.[1] Crossing another fence, they looked into one pole barn and saw only empty boxes. Then they walked under the tin overhang of the second barn, up to a closed gateway. With the aid of their flashlights, they looked through

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[1] Gospodarek initially testified at the suppression hearing that he was unaware that he was on Dunn's property when he first noted the odor of phenylacetic acid. That he was on Dunn's ranch, however, is established beyond doubt by his further testimony and the other evidence. *See* note 2, *infra*.

the barn's openings and noted its contents. They saw chemicals and chemical equipment in a setting taken to be a phenylacetone laboratory.

Their mission completed, Gospodarek and Fite withdrew. Shortly afterwards, Gospodarek telephoned Surovec and reported the findings. Adding this information to that already in hand, Surovec began preparing an affidavit for a warrant to search the ranch.[2] The drafting was completed on November 6, 1980.

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[2] Surovec's affidavit stated:

> At about 10:55 p.m., on November 5, 1980, Agent Gospodarek telephonically advised me that he and Houston Police Officer Martin Fite had walked down a fence line south of the farm which separates Dunn's property from adjacent property. At this time, Agent Gospodarek related to me that he and Officer Fite had smelled a strong chemical odor which indicated to Agent Gospodarek that phenylacetone was being manufactured. Agent Gospodarek and Officer Fite then crossed over the fence and approached the barn-like structure at the rear of the house and at this time observed, with the use of flashlights, that one side of the barn was open and that inside the barn there were three large flasks in a refluxing stage.

Surovec's affidavit continued:

> On the evening of November 5, 1980, Agent Gospodarek telephonically advised me that he had determined through the Blanco Courthouse and through Game Warden Warren Guthrie that the farm consisted of 198.1 acres and had been purchased by Ronald D. Dunn in February 1980.

It is clear from testimony at the suppression hearing that the affidavit contains several misstatements. Although the errors are apparent, the warrant issued on the evening of November 6, 1980 is not invalid for this reason. "Under the holdings in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and *United States v. Astroff*, 578 F.2d 133 (5th Cir. 1978), a warrant may be invalidated for misstatements in an affidavit only if the misrepresentations were

On two occasions on November 6, 1980, officers made entry into the ranch and inspected the buildings. In the early afternoon, Gospodarek, accompanied by DEA Agent Fred Thomas, returned to see in daylight what had been observed by flashlight. They had no warrant authorization, although Agent Surovec was in the process of preparing the supporting affidavit. While on the property, they installed one electronic surveillance device on the private drive, just off the public road, and another on the gate of the barn housing the laboratory. The devices were placed on Dunn's property without prior warrant authorization.[3]

At approximately 6:00 p. m. that same day, Surovec completed preparation of the warrant affidavit and, accompanied by DEA chemist Buddy Goldston and DEA technician Wayne Moody, he presented the warrant request to a federal magistrate. A warrant to search the Dunn ranch was issued at 8:30 p. m. on the night of November 6, 1980.

While Surovec was requesting the warrant from the magistrate, Gospodarek, accompanied by other agents, again made entry. Gospodarek looked for vehicles or persons. He also checked the suspect barn before withdrawing.

On the night of November 7, 1980, Goldston and Fite again entered the Dunn property. This was the first post-warrant visit to the ranch. They made no effort to effect seizures pursuant to the warrant, de-

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material and intentional." United States v. Lewis, 621 F.2d 1382, 1389 (5th Cir. 1980) (emphasis added). No evidence of intentional misrepresentation was offered.

[3] The electronic sensors were not designed to intercept conversations. They were placed near the driveway and on the barn gate to detect the passage of vehicles or persons.

spite the claim of exigent circumstances set forth in the affidavit,[4] but merely observed the laboratory and departed.

At approximately 10:00 a. m. on November 8, 1980, the warrant was executed. DEA agents, accompanied by state law enforcement personnel, drove to the ranch and found Dunn. Officer Fite, armed with a shotgun, arrested Dunn, placed him in handcuffs, and escorted him into the ranch house while other officers loaded the chemicals and equipment and searched the premises.

Dunn was informed of his *Miranda* rights.[5] Thereafter, in response to a question whether any controlled substances were in the house, he directed the officers to a closet which contained bags of amphetamine.[6]

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[4] The warrant affidavit reads:

> Affiant states that the contraband in the instant case is such that it can be easily destroyed and that since the illicit manufacture of phenylacetone, amphetamine and methamphetamine is a process taking several hours and often conducted through the night-time hours as well as the daytime, affiant requests authority to execute at any time (day or night).

[5] Under *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 649 (1966), the accused must be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . ."

[6] A dispute exists whether Dunn asserted or waived his right to the presence of counsel before speaking. Dunn's account is supported by the testimony of one agent who recalled that Dunn said he would "like to talk to his lawyer prior to making a decision." It is possible that *Miranda* and its progeny may have compelled the cessation of questioning. We do not

The Fourth Amendment Conundrum

The fourth amendment challenge to the evidence obtained from the execution of the search warrant, as well as to the evidence resulting from the earlier visits to the ranch, squarely presents the elusive expectation of privacy issue. If Dunn's fourth amendment protections were abrogated by the entries on November 5 and 6, the evidence discovered at that time and later seized pursuant to the warrant [7] must be excluded and Dunn's convictions must be set aside. That same reasoning does not apply to Carpenter since he cannot assert a legitimate expectation of privacy in any place searched or item seized.[8]

Although not specifically enumerated in the Constitution, the right of privacy long has been recognized.[9]

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decide that issue, however; our disposition of the appeal makes the resolution of this question unnecessary.

[7] The bulk of the warrant affidavit was composed with information obtained as a result of the warrantless entries on November 5 and 6.

[8] Carpenter neither enjoyed nor claimed any possessory or proprietary interest in the Dunn ranch or in the items found therein. In *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), the Supreme Court rejected the automatic standing rule for possession offenses of *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). As a consequence, Carpenter is without standing to assert a fourth amendment claim. *See United States v. Whitley*, 670 F.2d 617 (5th Cir. 1982). *See also Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *United States v. Meyer*, 656 F.2d 979 (5th Cir. 1981).

[9] Writing in another context, Justice Blackmun noted that while the

> Constitution does not explicitly mention any right of privacy . . . a line of decisions . . . going back . . . as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11

Property interests once were considered paramount in fourth amendment applications. *See, e.g., Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).[10] But as the Supreme Court observed in *Rakas v. Illinois*, its decision in *Katz v. United States* repudiated *Olmstead* and *Goldman* and "held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place

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> S.Ct. 1000 [1001] 35 L.Ed. 734 (1891) . . . has recognized that a right of personal privacy, or a guarantee of certain . . . zones of privacy does exist under the Constitution. In varying contexts, the Court . . . found . . . the roots of that right in the First Amendment . . .; in the Fourth and Fifth Amendments . . .; in the penumbras of the Bill of Rights, . . . in the Ninth Amendment . . .; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. . . .

Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147, 176 (1973) (citations omitted).

[10] Justice Brandeis' *Olmstead* dissent provides a more modern perspective of the intent of the framers in drafting the fourth amendment:

> They conferred, as against the Government, the *right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect the right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed must be deemed a violation of the Fourth Amendment.

277 U.S. at 478, 48 S.Ct. at 572, 72 L.Ed. at 954 (Brandeis, J., dissenting) (emphasis added). More recently, it has been stated that "[t]he central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *South Dakota v. Opperman*, 428 U.S. 364, 377, 96 S.Ct. 3092, 3101, 49 L.Ed.2d 1000, 1009-10 (1976) (Powell, J., concurring) (citations omitted).

but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143, 99 S.Ct. at 430, 58 L.Ed.2d at 401. *See United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971). However, considerations of property interests are not irrelevant to the legitimate expection of privacy analysis, for "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment." *Rakas v. Illinois*, 439 U.S. at 153 n.12, 99 S.Ct. at 431 n.12, 58 L.Ed.2d at 401 n.12. The decisional standard developed in *Rakas* traces Justice Harlan's suggestion in his concurrence in *Katz*, specifically, the individual asserting the privacy interest must demonstrate an actual (subjective) expectation of privacy and the expectation must be in accord with societal notions of reasonableness.[11]

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[11] In invigorating the phrase "reasonable expectation of privacy," the Supreme Court has suggested that a weighing of the government's interest in the public health and welfare against the individual's rights is required. A balance of competing interests has been referred to as the "ready test for determining reasonableness." *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968) (*quoting Camara v. Municipal Court*, 387 U.S. 523, 536, 87 S.Ct. 1727, 1734, 18 L.Ed.2d 930 (1967)). *See Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). And as we cryptically have opined: "The metaphysics of property inter-

Dunn maintains that he held a reasonable expectation of privacy over his ranch property and the buildings thereon, particularly the barn and its contents. Evaluation of this contention requires a close look at several essential facts.

The ranch, modest in size for that area of Texas, is approximately 198 acres, and is encircled by a perimeter fence. The residence and the other buildings are in a small clearing almost surrounded by trees. The house and the barns are not visible from the farm to market road; they are not visible from the perimeter fence. There are interior fences, including one around the residence and one around the subject barn. Once inside the perimeter fence, it is necessary to penetrate at least one more fence before reaching the place where the officers stood while examining the interior of the barn.

We commence our legal analysis, mindful of the basic constitutional rule that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,' " *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971) (*quoting Katz v. United States*, 389 U.S. at 357, 88 S.Ct. at 514, 19 L.Ed.2d at 585). In that vein, the government's defense of the fourth amendment challenge relies on *United States v. Williams*, 581 F.2d 451 (5th Cir. 1978), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 789 (1979), to excuse the necessity for a warrant for the entries of Novem-

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ests and possessory interests under the Fourth Amendment determine whether there is a legitimate expectation of privacy." *United States v. Lewis*, 621 F.2d at 1388.

ber 5 and 6. *Williams* does not support the government's position.

In *Williams*, agents of the Bureau of Alcohol, Tobacco and Firearms (ATF), acting on a tip, visited a site in rural Mississippi which was suspected of housing a "still." The still could not be seen from the public roadway and the agents walked along a perimeter fence, approaching the outbuildings on the property. From the edge of an old fence, outside the curtilage of the farmhouse and perhaps off the subject property, the agents "detected the odor of moonshine liquor and fermented mash coming from the direction of the hogpen." 581 F.2d at 453. The agents crossed the remnants of a fence "at a place where it had been walked down almost to the ground," *id.*, and traced the odors to a large shed. With this information, a search warrant was obtained and executed, at which time Williams was arrested while carrying three gallons of moonshine.[12]

In *Williams*, we recognized that the expectation of privacy test "has done away with outmoded property concepts no longer satisfactory for fourth amendment analysis," *id.* (*citing The Supreme Court, 1967 Term*, 82 Harv.L.Rev. 63, 189 (1968)), but noted that "the distinction between open fields and curtilage is still helpful in determining the existence or not of reasonable privacy expectations." *Id.* (*citing* Note, 76 Mich.L.Rev. 154 (1977)). We further re-

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[12] The *Williams* court noted that "the government unaccountably concedes standing." 581 F.2d at 453 n.2. While the issue of standing to claim a fourth amendment violation was not raised or discussed, it does not appear that Williams possessed any legitimate expectations of privacy over the shed or its contents. In light of the Supreme Court's *Salvucci* opinion and our *Whitley* decision, if Williams' case was tried today, he would not be heard on a fourth amendment challenge.

marked "that open fields surrounding a house are not protected under the fourth amendment and that a search of them need not be accompanied by a warrant issued upon probable cause." *Id.* (*citing United States v. Brown*, 473 F.2d 952 (5th Cir.1973); *Atwell v. United States*, 414 F.2d 136 (5th Cir. 1969); *Hodges v. United States*, 243 F.2d 281 (5th Cir. 1957)).

We concluded that the protected curtilage extended to the shed in question and held that:

> as to outbuildings that are not encompassed by a fence that also includes the house, or perhaps a privacy or exclusionary one around them, the outer limits of the curtilage are defined by the walls of the remote outbuildings.

581 F.2d at 454. Notwithstanding, we determined that the agents had not violated the fourth amendment because they did not enter the shed. Additionally, the dilapidated fence they crossed was not viewed as either a privacy or exclusionary fence, since "in its best days it was meant to do no more than keep the hogs in, not to keep anyone out." *Id.*

Shortly after we rendered our *Williams* decision the Supreme Court announced *Rakas v. Illinois*. We disagree with the suggestion that the decisions are in conflict. Because the boundaries of the farm in *Williams* were not marked, and because the only manifestation of a privacy assertion or a proprietary exclusion was a broken down fence, subjective privacy expectations were lacking. Thus, the *Williams* decisional methodology comports fully with the guide established in *Rakas*.

By contrast, the fence around Dunn's ranch was complete and intact. The barn itself was circled by another substantial fence. Under *Williams* and earlier jurisprudence, *see Walker v. United States*, 225

F.2d 447 (5th Cir. 1955), the barn in question was within the curtilage of the residence and was within the protective ambit of the fourth amendment. "Certainly such buildings give an added expectation of privacy for their contents . . . ." *United States v. Williams*, 581 F.2d at 454. Having reached this conclusion, we must now consider the government's contention that the warrantless entries on November 5 and 6 were justified by exigent circumstances.

Probable Cause and Exigent Circumstances

The government makes a compelling argument that it had probable cause to act, a contention supported by the factual background of the case. The following factors all tend to bolster the reasonable belief that a criminal offense had been or was being committed: the accumulation of equipment and large quantities of chemicals, all purchased with cash and some acquired under a false name; the tracking of the chemicals to the Dunn ranch; the detection of the lost hot plate stirrer beeper signal on the Dunn property; Dunn's prior criminal record; and the remote location of the ranch. Accepting that probable cause to search the ranch property existed on November 5 and 6, a search warrant was mandatory unless exigent circumstances excused that constitutional requirement.

In support of the claim that exigent circumstances validated the warrantless searches, the government relies on *United States v. Villarreal*, 565 F.2d 932 (5th Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 92, 58 L.Ed.2d 116 (1978). Villarreal stands for the proposition that an officer making a legal stop of an automobile, who smells the odor of marihuana coming from the automobile, may conduct a search for that contraband. *See United States v. Barnard*, 553 F.2d

389 (5th Cir. 1977); *United States v. Andrade*, 545 F.2d 1032 (5th Cir. 1977); *United States v. McCrary*, 543 F.2d 554 (5th Cir. 1976); *United States v. Diaz*, 541 F.2d 1165 (5th Cir. 1976). The government attempts to use the thread from these decisions to weave a net in the instant case, suggesting that since an officer who smells the odor of marihuana emanating from an auto legally stopped may search for the source, a DEA agent who smells phenylacetic acid likewise may search for the source. Neither logic nor jurisprudence supports this reasoning, however, for the two situations are not parallel. The officers in the cited cases were performing their duties in a legal fashion; they were where they had a duty and a right to be. While in these positions they detected the odor of contraband. In these situations, they were allowed and were required to seek the source.

But that was not the circumstance in the case at bar. The law enforcement officers were trespassing, having crossed a perimeter fence prior to detecting the suspicious odor. In addition to that basic dissimilarity, the odor detected was not that of a contraband. The officers in the *Villarreal* line of cases smelled a controlled substance; the DEA agent on Dunn's ranch smelled a legal chemical, phenylacetic acid. Even if it had been the odor of contraband, the occurrence of the trespass before the detection would vitiate the use of this information. A release from fourth amendment requirements cannot be based on fourth amendment violations. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The cited cases are subject to a further, critical distinction: they all involve an automobile. While motor vehicles and other means of transportation are protected by the fourth amendment,[13] they receive markedly different treatment.[14] Notably, the Supreme Court has observed:

> this Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts. . . . The answer lies in the diminished expectation of privacy which surrounds the automobile. . . .

United States v. Chadwick, 433 U.S. at 12, 97 S.Ct. at 2484, 53 L.Ed.2d at 549 (citations omitted). Prac-

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[13] *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964); *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

[14] *See, e.g., New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). *See also United States v. Michael*, 645 F.2d 252 (5th Cir. 1981) (en banc).

ically speaking, when a vehicle is involved and probable cause to search exists, exigent circumstances usually are present.[15]

The contention that exigent circumstances existed in the present case is belied by the facts perceivable at the time, confirmed with the 20/20 visual acuity of hindsight.[16] Although the agents expressed concern that the laboratory might be dismantled and moved before a warrant could be obtained, this argument is not persuasive. The area was remote. Access was limited, particularly vehicle ingress and egress. In addition, the ranch property was subject to surveillance readily from both the ground and the air.

Moreover, in light of the actions of the agents, the protestations of urgency, including those recited in the warrant affidavit, are not convincing. Although obtained on the night of November 6, 1980, the warrant was not executed until approximately 10:00 a.m. on November 8, despite the entry of agents on November 7. The necessity for swift action, which purportedly justified the warrantless entries on Novem-

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[15] The "inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman*, 428 U.S. at 367, 96 S.Ct. at 3096, 49 L.Ed.2d at 1004 (citations omitted). Even disregarding the issue of mobility, "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than relating to one's home or office." *Id.* (footnote omitted). *See Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

[16] The determination of probable cause and exigent circumstances must be based on the circumstances as they existed at the time of the challenged action, and must be viewed from the perspective then obtaining. Our reference to hindsight in no way modifies that well-established rubric.

ber 5 and 6, is not apparent in the officers' post-warrant conduct.

The government bears the burden of justifying a warrantless search. *United States v. De LaFuente*, 548 F.2d 528 (5th Cir.), *cert. denied*, 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed.2d 249 (1977). *See United States v. Osborne*, 630 F.2d 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981). It has not borne this burden. Consequently, the evidence gathered during the search on November 8, 1980, by virtue of a warrant issued on the basis of information collected during unconstitutional entries and viewings, should have been excluded from the case against Dunn. Admission of the evidence was reversible error which mandates a remand for a new trial.

Dunn's Statements

In determining whether Dunn's inculpatory statements uttered shortly after his arrest on November 8 must be excluded from evidence, we are guided by the teachings of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). *See, e.g., United States v. Vicknair*, 610 F.2d 372 (5th Cir.), *cert. denied*, 449 U.S. 823, 101 S.Ct. 83, 66 L.Ed.2d 25 (1981). The district court declined to suppress the remarks Dunn made at the time of his arrest. We must decide whether the illegality of the warrantless searches, which led to the issuance of the search warrant and to Dunn's arrest, irretrievably tainted those statements.

We are aware of no bright-line formula to resolve the dilemma and we are mindful that "[n]ot every fruit that grows from poisonous trees is constitu-

tionally lethal." *United States v. Vicknair*, 610 F.2d at 381. Exclusion is not justified if the government demonstrates that the connection between an illegal search and the evidence obtained has become "so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341, 60 St.Ct. 266, 268, 84 L.Ed. 307, 312 (1939).[17] While degrees of attenuation necessarily are determined on a case-by-case basis, the *Ceccolini* Court offered the following methodological outline:

> Evaluating the standards for application of the exclusionary rule to live-witness testimony . . ., we are first impelled to conclude that the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule is advanced by its application. This is certainly true when the challenged statements are made by a putative defendant after arrest, *Wong* [*v. United States*, 371 U.S. at 491, 83 S.Ct. at 407]; *Brown v. Illinois* [422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)], and a *fortiori* is true of testimony given by nondefendants.

435 U.S. at 276, 98 S.Ct. at 1060, 55 L.Ed.2d at 277.

We are in accord with the analysis of our colleagues of the Ninth Circuit who distinguished "the

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[17] The "independent source" doctrine which also excuses the exclusion of certain evidence, *see, e.g., Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *United States v. Fredericks*, 586 F.2d 470 (5th Cir. 1978), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979), does not apply to the instant factual situation. Nor does the "inevitable discovery" principle, *see, e.g., Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), fit this case.

'live witness' testimony of a potential co-defendant . . . [from] that of a witness not arrested and not implicated in the criminal activities at issue." *United States v. Humphries*, 600 F.2d 1238, 1247 (9th Cir. 1979), *cert. denied*, 451 U.S. 988, 101 S.Ct. 2324, 68 L.Ed.2d 846 (1981). In the present case, Dunn was arrested; he uttered the incriminating statements shortly thereafter. The inculpatory statements were the product of the prior illegality and not of his free will. The arrest was related directly to a search which was authorized on the basis of recent violations of Dunn's privacy rights. Although the matter is not free from difficulty, we are convinced that the taint of the unlawful entries onto the Dunn ranch, which culminated in Dunn's arrest on the premises, had not been so attenuated as to permit use of the statements against Dunn.

Carpenter—Sufficiency of the Evidence

Carpenter contends that the evidence is insufficient to sustain his convictions. We disagree. Viewing the evidence in the light most favorable to the government, *see, e.g., Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Ocanas*, 628 F.2d 353 (5th Cir. 1980), we conclude that the jury could properly find Carpenter guilty beyond a reasonable doubt.

The convictions of Robert Lyle Carpenter are AFFIRMED.

The convictions of Ronald Dale Dunn are REVERSED and the matter is REMANDED for further proceedings not inconsistent herewith.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1200

D. C. Docket No. A-80-CR-89

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

RONALD DALE DUNN, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of Texas

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[Filed Sept. 26, 1985]

Before WISDOM, POLITZ, and TATE, Circuit Judges.

JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This cause came on to be heard on remand from the Supreme Court of the United States and on further briefs on the parties.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the District Court in this cause are reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

July 16, 1985

Issued as Mandate: July 16, 1985

Reissued as Mandate: Sep. 24, 1985

Reissued as Mandate: Nov. 26, 1985

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